

46 Am. Jur. 2d Judges § 179

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Judges

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IX. Disqualification to Act in Particular Case

C. Remedies and Procedure

3. Motion for Disqualification and Affidavit

a. In General

§ 179. Peremptory challenges to judge

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(3)

A statute granting a litigant the right to peremptorily challenge a judge guarantees a litigant the extraordinary right to disqualify a judge when timely and properly made, and the judge has no discretion to deny the motion but immediately loses jurisdiction and must self-recuse.¹ A party's right to excusal of a judge without cause is a procedural right meant to effectuate the substantive right of a fair and impartial tribunal recognized by the state and federal constitutions.² A statute authorizing a peremptory challenge of a judge is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the statute absolutely forbids it.³ When a litigant has met the requirements of a statute authorizing a peremptory challenge of a judge, the disqualification of the judge is mandatory, without any requirement of proof of facts showing that the judge is actually prejudiced.⁴

Because a peremptory judicial challenge is not subject to a hearing and takes effect instantaneously and irrevocably, later events do not cause a rescission of the challenge.⁵

A party is limited to only one such challenge in a case,⁶ and the motive of the party exercising the challenge is irrelevant.⁷

A party's acquiescence to a judge hearing one action does not impair such party's right to exercise a peremptory challenge to prevent that judge from hearing another matter, even if that matter raises issues closely related to those in the first action.⁸

Under some statutes, peremptory excusal of a judge is party-specific; each party has a separate right of excusal which cannot be affected by the actions of other parties in the case.⁹ In some jurisdictions the right of each party to the substitution of a judge applies in a civil action in which a summons is served and in which there is an adverse party.¹⁰ Pursuant to other statutes, a late-appearing party may exercise a peremptory challenge only when parties on the same side have waived or have not exercised such challenge, and when a party on the same side has exercised a peremptory challenge or a party peremptorily disqualifies a judge and is then dismissed from the action, a party seeking a subsequent peremptory challenge has the burden of proving that its interests are substantially adverse to those of the coparty that previously exercised a challenge.¹¹

CUMULATIVE SUPPLEMENT

Cases:

One-challenge-per-side limitation to challenges, under statute governing peremptory challenges to disqualify a judge, is essential to prevent abuse by parties that merely seek to delay a trial or obtain a more favorable judicial forum, and courts must be vigilant to enforce it. *Cal. Civ. Proc. Code § 170.6. Prescription Opioid Cases*, 57 Cal. App. 5th 1039, 272 Cal. Rptr. 3d 99 (2d Dist. 2020), as modified, (Dec. 1, 2020) and review filed, (Jan. 4, 2021).

Contemnor waived peremptory challenge to prevent judge who entered order which contemnor disobeyed from presiding over contempt hearing, where judge had already presided over contempt hearing by time contemnor objected. *Nev. Rev. St. § 22.030(3). Detwiler v. Eighth Judicial District Court in and for County of Clark*, 486 P.3d 710, 137 Nev. Adv. Op. No. 18 (Nev. 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 *Ziesmer v. Superior Court*, 107 Cal. App. 4th 360, 132 Cal. Rptr. 2d 130 (2d Dist. 2003), as modified on denial of reh'g, (Apr. 22, 2003); *Elrod v. Stewart*, 163 S.W.3d 587 (Mo. Ct. App. W.D. 2005). As to whether change of venue for prejudice of judge is mandatory or discretionary, see *Am. Jur. 2d, Venue § 58*.
- 2 *Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, 309 P.3d 80 (N.M. 2013).
- 3 *Maas v. Superior Court*, 1 Cal. 5th 962, 209 Cal. Rptr. 3d 571, 383 P.3d 637 (Cal. 2016).
- 4 *Maas v. Superior Court*, 1 Cal. 5th 962, 209 Cal. Rptr. 3d 571, 383 P.3d 637 (Cal. 2016).
- 5 *Davcon, Inc. v. Roberts & Morgan*, 110 Cal. App. 4th 1355, 2 Cal. Rptr. 3d 782 (4th Dist. 2003).
- 6 *Le Louis v. Superior Court*, 209 Cal. App. 3d 669, 257 Cal. Rptr. 458 (5th Dist. 1989).
- 7 *Peracchi v. Superior Court*, 30 Cal. 4th 1245, 135 Cal. Rptr. 2d 639, 70 P.3d 1054 (2003); *State ex rel. L.B. v. Frawley*, 136 S.W.3d 534 (Mo. Ct. App. E.D. 2004).
- 8 *Ziesmer v. Superior Court*, 107 Cal. App. 4th 360, 132 Cal. Rptr. 2d 130 (2d Dist. 2003), as modified on denial of reh'g, (Apr. 22, 2003).
- 9 *Aussieker v. City of Bloomington*, 355 Ill. App. 3d 498, 291 Ill. Dec. 52, 822 N.E.2d 927 (4th Dist. 2005).
- 10 *In re Estate of Greene*, 2013 MT 174, 370 Mont. 490, 305 P.3d 52 (2013).
- 11 *Home Ins. Co. v. Superior Court*, 34 Cal. 4th 1025, 22 Cal. Rptr. 3d 885, 103 P.3d 283 (2005).